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Supreme Court, U.S.
FILED
MAY 22 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1910

In the Supreme Court of the United States

OCTOBER TERM, 1988

DANIEL H. OVERMYER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the court of appeals erred in reversing an order granting a motion for a judgment of acquittal following a jury verdict of guilty.

On January 28, 1986, petitioner and Edmund M. Connery were indicted in the United States District Court for the Northern District of Ohio. The indictment charged petitioner with six counts of bankruptcy fraud, in violation of 18 U.S.C. 152; two counts of conspiracy to commit bankruptcy fraud, in violation of 18 U.S.C. 371; and one count of mail fraud, in violation of 18 U.S.C. 1341. Connery, charged in six counts, was granted a severance. Pet. App. 21a.

Before the case was submitted to the jury, the district court granted a judgment of acquittal on five counts. The

court submitted the four remaining counts to the jury. Thereafter, the jury acquitted petitioner on three counts. The jury, however, returned a guilty verdict on a count charging that petitioner knowingly filed a false bankruptcy claim on behalf of Hadar International Leasing Company against the bankruptcy estate of D.H. Overmyer Telecasting. Pet. App. 21a. The false claim was based upon various television broadcast equipment leases between Hadar and Telecasting. Pet. App. 22a.

The district court granted a post-verdict judgment of acquittal on the ground that the government had, at best, established that petitioner filed a claim that was subject to dispute. The court found that a claim for lease payments prior to the installation of a transmitter was not properly treated as a false claim, that installation charges for work in progress were not fraudulent solely because they represented bids from contractors rather than full legal obligations, and that the government had not met its burden of showing that Telecasting had overpaid Hadar for its leasing obligations. Pet. App. 1a-19a.

The court of appeals reversed. Pet. App. 20a-59a. The court concluded that the jury had sufficient evidence before it from which it could reasonably conclude that petitioner's bankruptcy claim was intended to deceive the bankruptcy court.

Petitioner contends (Pet. 7-10) that the court of appeals ignored the expansive definition of "claim" in the Bankruptcy Code, 11 U.S.C. 101(4). Petitioner also contends (Pet. 11-15) that the false claim clause of 18 U.S.C. 152 does not apply to claims filed at a point in the proceedings where the parties contemplate full adversarial litigation on the claims.

Whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his post-trial motion for a judgment of acquittal. If,

after the imposition of sentence by the district court, the court of appeals reverses petitioner's conviction because of trial error, his claims might be mooted by an acquittal following a second trial on the merits. If, on the other hand, the court of appeals affirms his conviction, petitioner will then be able to raise his present contentions before this Court, together with any other claims he may have with respect to possible trial errors or other errors in the proceedings, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

KENNETH W. STARR
Solicitor General

JUNE 1989

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* Because this case is in an interlocutory posture, we are not responding on the merits to the questions presented by the petition. We will file a response on the merits if the Court requests.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—241 699/00310